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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-91343; File No. SR-NYSE-2020-98]

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Amend its Rules to Prohibit Member Organizations from Seeking Reimbursement, in Certain Circumstances, from Issuers for Forwarding Proxy and Other Materials to Beneficial Owners

March 17, 2021.

I. Introduction

On November 30, 2020, New York Stock Exchange LLC (“NYSE” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to amend its rules to prohibit member organizations from seeking reimbursement from issuers for forwarding proxy and other materials to beneficial owners who received shares from their broker at no cost or at a price substantially less than the market price in connection with a promotion by the broker. The proposed rule change was published for comment in the Federal Register on December 18, 2020.<sup>3</sup> On January 29, 2021, pursuant to Section 19(b)(2) of the Exchange Act,<sup>4</sup> the Commission designated a longer period within which to either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.<sup>5</sup> This order institutes

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Securities Exchange Act Release No. 90653 (December 14, 2020), 85 FR 82539 (“Notice”). Certain comments filed in response to File No. SR-NYSE-2020-96 by Paul Conn, President, Global Capital Markets, Computershare, dated January 11, 2021 (“Computershare Letter”), and Niels Holch, Executive Director, Shareholder Communications Coalition, dated January 20, 2021 (“Coalition Letter”), also address this proposed rule change. These comments on the proposed rule change are available at: <https://www.sec.gov/comments/sr-nyse-2020-98/srnyse202098.htm>.

<sup>4</sup> 15 U.S.C. 78s(b)(2).

<sup>5</sup> See Securities Exchange Act Release No. 91011, 86 FR 8246 (February 4, 2021). The Commission designated March 18, 2021, as the date by which it should approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule change.

proceedings under Section 19(b)(2)(B) of the Exchange Act<sup>6</sup> to determine whether to approve or disapprove the proposed rule change.

## II. Description of the Proposal

NYSE Rules (“Rule”) 451 and 465 require NYSE member organizations that hold securities for beneficial owners in street name to solicit proxies from, and deliver proxy and issuer communication materials to, beneficial owners on behalf of issuers.<sup>7</sup> For this service, issuers reimburse NYSE member organizations for out-of-pocket, reasonable clerical, postage and other expenses incurred for a particular distribution.<sup>8</sup> This reimbursement structure stems from SEC Rules 14b-1 and 14b-2 under the Act,<sup>9</sup> which impose obligations on companies and nominees to ensure that beneficial owners receive proxy materials. These rules require companies to send their proxy materials to broker-dealers or banks, who are nominees that hold securities in street name, for forwarding to beneficial owners, and to pay nominees for reasonable expenses, both direct and indirect, incurred in providing proxy information to beneficial owners.<sup>10</sup> The Commission’s rules do not specify the fees that nominees can charge issuers for proxy distribution; rather, they state that issuers must reimburse the nominees for “reasonable expenses” incurred.<sup>11</sup>

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<sup>6</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>7</sup> See Rules 451 and 465; Notice, supra note 3, at 82539. The ownership of shares in street name means that a shareholder, or “beneficial owner,” has purchased shares through a broker-dealer or bank, also known as a “nominee.” In contrast to direct ownership, where shares are directly registered in the name of the shareholder, shares held in street name are registered in the name of the nominee, or in the nominee name of a depository, such as the Depository Trust Company. See Securities Exchange Act Release No. 70720 (October 18, 2013), 78 FR 63530 n.14 (October 24, 2013) (order approving SR-NYSE-2013-07) (“2013 Approval Order”).

<sup>8</sup> See Rule 451 and 465; 2013 Approval Order, supra note 7, at 63531.

<sup>9</sup> 17 CFR 240.14b-1; 17 CFR 240.14b-2.

<sup>10</sup> See 17 CFR 240.14b-1 and 14b-2; see also 2013 Approval Order, supra note 7, at 63531.

<sup>11</sup> See 17 CFR 240.14b-1 and 14b-2; see also 2013 Approval Order, supra note 7, at 63531. Currently, the Supplementary Material to Rule 451, which is cross-referenced by the Supplementary Material to Rule 465, establishes maximum rates at which a NYSE

The Exchange has proposed to adopt Rule 451A, pursuant to which, notwithstanding the applicable provisions of Rules 451 or 465 or what may be permitted by the rules of any other national securities exchange or national securities association of which a member organization is also a member, no fee shall be imposed for a nominee account that contains only shares or units of the securities involved that were transferred to the account holder by the member organization at no cost or at a price substantially less than the market price.<sup>12</sup>

According to the Exchange, the proposed rule is meant to address a recent practice in which retail brokers provide customers, without charge, a small number of shares with a very small dollar value as a commercial incentive (for example, upon opening a new account or referring a new customer to the broker).<sup>13</sup> NYSE notes that Rule 451 does not distinguish between these beneficial owners and beneficial owners that have paid for their shares, so brokers are required to solicit proxies for these accounts and are entitled to reimbursement of their expenses under NYSE and other SRO rules.<sup>14</sup> The Exchange states that, in certain cases, the issuer can experience a significant increase in its distribution reimbursement expenses solely due to its shares being included in these broker promotional schemes.<sup>15</sup>

The Exchange believes that it would be more appropriate for the broker to bear the proxy distribution costs in these circumstances.<sup>16</sup> According to the Exchange, while the distribution of shares in these broker promotions may result in a significant increase in the number of beneficial owners of an issuer's stock, the generally very small size of each of these positions means that they usually represent a very small percentage of the voting power.<sup>17</sup> As such, according to the

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member organization may be reimbursed for expenses incurred in connection with distributing proxy and other issuer communication materials to beneficial shareholders.

<sup>12</sup> See proposed Rule 451A.

<sup>13</sup> See Notice, supra note 3, at 82539.

<sup>14</sup> Id.; see also, e.g., FINRA Rule 2251.

<sup>15</sup> See Notice, supra note 3, at 82539.

<sup>16</sup> Id.

<sup>17</sup> Id.

Exchange, the costs the issuer incurs in reimbursing the broker for distributing proxies to these accounts is very disproportionate to the maximum potential vote such shares represent.<sup>18</sup> The Exchange states that, by contrast, the broker using such a scheme chooses to engage in it because it believes that it will result in a commercial benefit to the broker.<sup>19</sup> In addition, the Exchange notes that recipients of shares without charge or at a price substantially less than the market price from the broker as part of such schemes typically will not be given any choice as to which shares they receive and are therefore not making any investment decision.<sup>20</sup>

The Exchange states that proposed Rule 451A would not limit a broker's right to reimbursement for distributions to any beneficial owner if any part of that beneficial owner's position in an issuer's securities was received by any means other than a transfer without charge or at a price substantially less than the market price from the broker.<sup>21</sup> The Exchange further states that Rules 451 and 465 would continue to apply to all distributions, so the broker would continue to be fully obligated to solicit votes from, and make other distributions on behalf of issuers to, all beneficial owners notwithstanding the limitations on reimbursement of expenses imposed by proposed Rule 451A.<sup>22</sup>

### III. Summary of Comment Letters Received

Two commenters expressed general support for the proposal.<sup>23</sup> One commenter stated that the recent broker practice of gifting small amounts of securities to retail brokerage clients as a promotional measure has caused significant increases in proxy costs for some issuers, and expressed the view that the proposal would alleviate much of the cost impact to issuers from this

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<sup>18</sup> Id.

<sup>19</sup> Id. 82539-40.

<sup>20</sup> Id. at 82540.

<sup>21</sup> Id. at 82540.

<sup>22</sup> Id.

<sup>23</sup> See Computershare Letter at 2-3; Coalition Letter at 5 n.14.

broker practice, particularly for accounts defaulted to e-delivery.<sup>24</sup> The other commenter stated that it was supportive of the proposal, and that these types of promotions provide commercial benefits to broker-dealers without providing any parallel benefits to public companies.<sup>25</sup>

IV. Proceedings to Determine Whether to Approve or Disapprove SR-NYSE-2020-98 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act to determine whether the proposal should be approved or disapproved.<sup>26</sup> Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change, as discussed below. Institution of disapproval proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved.

Pursuant to Section 19(b)(2)(B) of the Act, the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis and input concerning the proposed rule change's consistency with the Act and, in particular, with Section 6(b)(4) of the Act,<sup>27</sup> which requires that an exchange have rules that provide for the equitable allocation of reasonable dues, fees and other charges among its members, issuers and other persons using its facilities, and with Section 6(b)(5) of the Exchange Act,<sup>28</sup> which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free

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<sup>24</sup> See Computershare Letter at 2-3. This commenter also stated that while it understood that the accounts that receive such “gifted” securities generally are set for electronic communications, as a technical matter it should be noted that if a street-name holder of gifted securities receives hardcopy proxy communications rather than electronic delivery, the issuer will still bear increased costs from printing the materials to be disseminated by the broker. Id.

<sup>25</sup> See Coalition Letter at 5 n.14.

<sup>26</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>27</sup> 15 U.S.C. 78f(b)(4).

<sup>28</sup> 15 U.S.C. 78f(b)(5).

and open market and a national market system, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

Proposed Rule 451A would prohibit an NYSE member firm from seeking reimbursement for expenses incurred in connection with the distribution of proxies or other materials to a beneficial owner on behalf of an issuer, in cases where the member has provided the shares held in the beneficial owner's account at no cost or at a price "substantially less than the market price." However, the Exchange does not explain how it would determine whether a price is "substantially less than the market price," such that reimbursement could not be sought, or provide any other guidance on the meaning of that term. In addition, the proposed prohibition on reimbursement would not apply if any part of the beneficial owner's position in an issuer's securities was received by any means other than a below-market price transfer from the member seeking reimbursement. As a result, if a customer transferred its account to a new broker-dealer, or held any other shares of the issuer in its account, the member would be permitted to seek reimbursement for its expenses. The Exchange does not explain why it is consistent with the Act for the issuer to bear the distribution costs in these scenarios, or address the feasibility of tracking shares held by a particular beneficial owner where the eligibility for reimbursement may change over time. Finally, the Commission notes that Rule 14b-1 under the Act provides that a broker-dealer need not satisfy its obligations to distribute proxies or other materials to a beneficial owner unless it is provided "assurance of reimbursement of [its] reasonable expenses, both direct and indirect, incurred in connection with performing [those] obligations."<sup>29</sup> Under the Exchange's proposal, a broker-dealer would be required to distribute proxies or other materials in the circumstances described, but be precluded from seeking reimbursement of its expenses. The Exchange has not explained how this is consistent with the provisions of Rule

14b-1. Accordingly, the Commission believes questions are raised as to the consistency of the proposal with Sections 6(b)(4) and 6(b)(5) of the Act, including whether it provides for the equitable allocation of reasonable fees, protects investors and the public interest, and is not designed permit unfair discrimination between customers, issuers and broker-dealers.

The Commission notes that, under the Commission’s Rules of Practice, the “burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder ... is on the self-regulatory organization [‘SRO’] that proposed the rule change.”<sup>30</sup> The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,<sup>31</sup> and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Exchange Act and the applicable rules and regulations.<sup>32</sup>

For these reasons, the Commission believes it is appropriate to institute proceedings pursuant to Section 19(b)(2)(B) of the Exchange Act<sup>33</sup> to determine whether the proposal should be approved or disapproved.

#### V. Commission’s Solicitation of Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written view of interested persons concerning whether the proposal is consistent with Section 6(b)(5) or any other provision of the Exchange Act, or the rules and regulations thereunder. Although there

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<sup>30</sup> Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

<sup>31</sup> See id.

<sup>32</sup> See id.

<sup>33</sup> 15 U.S.C. 78s(b)(2)(B).

do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.<sup>34</sup>

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal should be approved or disapproved by [insert date 21 days from publication in the Federal Register]. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by [insert date 35 days from publication in the Federal Register].

Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSE-2020-98 on the subject line.

Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSE-2020-98. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications

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<sup>34</sup> Section 19(b)(2) of the Exchange Act, as amended by the Securities Act Amendments of 1975, Pub. L. 94-29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).



relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSE-2020-98 and should be submitted on or before [insert date 21 days from publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>35</sup>

J. Matthew DeLesDernier,  
Assistant Secretary.

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<sup>35</sup> 17 CFR 200.30-3(a)(57).